

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DAVID C. BISHOP,)	
)	
Plaintiff)	
)	
v.)	ME Docket no. 99-CV-189-B
)	NH Civil no. 00-190-B
BELL ATLANTIC CORPORATION,)	
)	
Defendant)	

ORDER AND MEMORANDUM OF DECISION

SINGAL, District Judge

Before the Court is Defendant Bell Atlantic Corporation's motion to reconsider (Docket #37) the Court's Order and Memorandum of Decision, dated October 26, 2000 (Docket #35), in which this Court denied Defendant's motion for summary judgment and instead entered partial summary judgment, narrowing the factual issues for trial. Defendant now asks this Court to reconsider that Order and to enter summary judgment against all of Plaintiff David Bishop's remaining claims. For the reasons discussed below, the Court DENIES Defendant's motion.

I. THE COURT'S AUTHORITY TO RECONSIDER ITS PREVIOUS ORDER

As a preliminary matter, Plaintiff challenges Defendant's right to make a motion for reconsideration. In the present case, after Defendant moved for summary judgment, Plaintiff filed a response brief with affidavits addressing factual allegations not mentioned in Defendant's summary judgment motion. In its reply brief, Defendant argued against some of Plaintiff's factual allegations, but paid little attention to Plaintiff's

other factual allegations. Based on some of those factual assertions, which were not thoroughly argued by Defendant, this Court made a ruling of partial summary judgment. The Court found that many of Plaintiff's factual averments were immaterial, while six matters presented genuine issues of material fact.

Now, Defendant addresses those six remaining issues with the vigor that perhaps it should have utilized in its initial reply brief. Rationalizing its failure to counter all of Plaintiff's factual claims, Defendant asserts that it was subject to a seven-page limit in its reply brief according to Maine Local Rule 7(c). Defendant, however, never made an effort to seek the Court's permission for an extension of that page limit. Furthermore, Defendant could have fashioned a strong argument that the seven-page limit was inapplicable because Defendant originally filed its motion for summary judgment in the United States District Court of New Hampshire, and this Court has noted that New Hampshire's Local Rules would apply, which do not have a seven-page limit for reply briefs. (See Report of Telephone Conference & Am. Scheduling Order, Aug. 8, 2000 (Docket #29).)¹ Rather, in its motion for leave to file the reply brief, Defendant stated that only a "short" reply was necessary and that it would conform to Maine Local Rule 7(c). (See Def. Mot. for Leave to File Reply Br. (Docket #31).) Therefore, it appears that Defendant voluntarily chose to file a terse, seven-page brief.

Defendant's failure to aggressively address all of Plaintiff's factual allegations, however, does not necessarily mean that this Court cannot reconsider its prior Order. Plaintiff characterizes the motion for reconsideration as a "second bite of the apple." (See Pl. Opp'n to Def. Mot. to Reconsider at 2 (quoting Sequa Corp. v. GBJ Corp., 156

¹ Because Defendant characterizes the present motion for reconsideration as filed under New Hampshire Local Rule 7.2(d), Defendant implies that New Hampshire Local Rules continue to apply.

F.3d 136, 144 (2nd Cir. 1998)) (Docket #38).² Indeed, a party moving for reconsideration of a judgment pursuant to Fed. R. Civ. P. 59(e) is only entitled to reconsideration if the movant relies on newly discovered facts or manifest errors of law. See, e.g., Vasapolli v. Rostoff, 39 F.3d 27, 36 (1st Cir. 1994). These limitations on a court's authority to reconsider a judgment, however, only apply to final judgments. See, e.g., Fed. R. Civ. P. 59(e); FDIC v. World Univ., Inc., 978 F.2d 10, 16 (1st Cir. 1992) (district courts should dismiss 59(e) motions if they raise arguments that should have been raised before entry of final judgment). This Court entered partial summary judgment, which despite its label, is not actually a final judgment. See, e.g., Powers v. Nassau Dev. Corp., 753 F.2d 457, 464 (5th Cir. 1985); Wright, Miller & Kane, 10B Federal Practice & Procedure: Civil 3d § 2737 (1998). Rather, partial summary judgment is an interlocutory order that does not completely dispose of a case, but instead narrows the relevant issues for trial. See, e.g., Rivera-Flores v. Puerto Rico Tel. Co., 64 F.3d 742, 747 (1st Cir. 1995). Therefore, the Court may consider Defendant's motion to reconsider the order of partial summary judgment.

II. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The Court grants a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The Court must view

² Actually, Defendant's motion is the third bite of the summary judgment apple. Defendant filed a motion to dismiss under rule 12(b)(6) or for summary judgment (Docket #2) on July 23, 1999, which the Court treated as a motion for summary judgment and partially granted (Docket #11). On July 17, 2000, Defendant filed a second motion for summary judgment (Docket #25), which the Court denied, instead entering partial summary judgment in the Order that Defendant now challenges.

the facts “in the light most amicable to the party contesting summary judgment, indulging all reasonable inferences in that party’s favor.” Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993).

III. BACKGROUND

Plaintiff alleges a plenitude of facts supporting his case for unlawful employment discrimination, detailed in the prior Order of the Court. (See Order at 2-12 (Docket #35).) The Court reiterates only the relevant information here.

Plaintiff David Bishop works as a technician for Defendant Bell Atlantic Corporation (“Bell Atlantic”) at its Ellsworth garage. Bishop alleges that after August 26, 1997, the date upon which he filed a complaint against his employer with the Maine Human Rights Commission (“MHRC”), Bell Atlantic began retaliating against him in a variety of ways, in violation of the Maine Human Rights Act (“MHRA”), 5 M.R.S.A. §§ 4551—4633. Bishop filed two additional complaints with the MHRC, which allegedly prompted continuing retaliation from the company.

Bishop filed suit in state court, and Bell Atlantic removed the action to this Court. Subsequent to discovery, Bell Atlantic moved for summary judgment. In response, Bishop argued that fourteen distinct factual matters served as bases for his claims of illegal retaliation. Finding eight of those matters immaterial to the case, the Court ordered partial summary judgment against them. Now, only six of Bishop’s factual allegations remain viable for trial.

A. Overtime

Bishop alleges that Bell Atlantic withheld earned overtime payments and often did not advise him of opportunities to work overtime. Bishop claims that one-third of his paychecks during 1997 and 1998 were missing compensation for overtime hours that he had worked. Also, Bishop alleges that other technicians received postings to work overtime on their computers, but that the company did not post many of these overtime opportunities on Bishop's computer. In addition, one of Bishop's fellow technicians, Dana Shaw, stated in an affidavit that he rarely had difficulty receiving overtime compensation or overtime opportunities.

B. Retraining

On October 6, 1997, Bell Atlantic sent Bishop to Marlboro, Massachusetts to undergo what Bishop characterizes as "basic retraining." Bishop contends that Bell Atlantic never ordered him to participate in such retraining before, and that the company has never ordered another technician with his level of experience to go through basic retraining. As a result of being sent to basic retraining, Bishop allegedly lost additional overtime opportunities.

C. Failure to Provide Rain Gear

Between mid-February and May 1998, Bishop witnessed his supervisors disseminating rain gear to other technicians, even though they would not give him any rain gear.

D. Withholding Proper Credit for Jobs Completed

Bishop alleges that on October 18, 1998 he performed three jobs, but his supervisor only gave him credit for two jobs. Bishop claims that he personally checked all of the records for all of the other technicians for that day and that the company had not entered an inaccurate number of completed jobs for anyone else. Bishop claims that receiving proper credit for completed jobs is essential to meeting productivity standards.

E. The Action Plan

On November 16, 1999, Bell Atlantic placed Bishop on an “action plan”. The action plan requires Bishop to call a supervisor and obtain permission to stop working on any job that he cannot complete by himself before proceeding to the next job. Claiming that he had never before been placed on such an action plan, Bishop alleges that making these calls reduces his productivity.

F. The Three-Day Suspension

On February 28, 2000, Bell Atlantic suspended Bishop for three days, allegedly for destroying company property on November 16, 1999. At a job site on November 16th, Bishop claims that he discovered a wire with a defect, so he cut out the defect. In February, the company investigated the job site and concluded that Bishop was mistaken and that he had destroyed non-defective company property.

IV. DISCUSSION

As the Court discussed in the previous Order, a claim of unlawful retaliation under the Maine Human Rights Act is analyzed in the same manner as a Title VII discrimination claim. See, e.g., Winston v. Maine Tech. Coll. Sys., 631 A.2d 70, 74-75 (Me. 1993). For a plaintiff to establish a prima facie case of unlawful retaliation, she must show that “(1) she engaged in protected conduct under Title VII (or here, Maine’s Human Rights Act or Whistleblower’s Protection Act); (2) she suffered an adverse employment action; and (3) a causal connection existed between the protected conduct and the adverse action.” Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996). In this case, there is no argument that Plaintiff engaged in protected conduct when he filed administrative complaints with the MHRC. Defendant, however, contends that Plaintiff cannot show that Defendant has engaged in adverse employment actions or that those alleged actions are causally connected to the filing of the MHRC charges.

An adverse employment action is any type of discrimination “with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment...” 5 M.R.S.A. § 4572(1)(A). The First Circuit has noted that adverse employment actions include a variety of types of conduct, such as “demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees.” Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998).

Circumstantial evidence can demonstrate the necessary causal link between the protected act and the adverse employment action, such as evidence of differential

treatment in the workplace, temporal proximity between the protected act and the adverse act, statistical evidence showing disparate treatment, and comments by the employer revealing a retaliatory mindset. See Mesnick v. Gen. Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991). Also, if an employer changes how it treats one of its employee after she performs the protected action, that can establish the requisite causal connection. See Simas v. First Citizens' Fed. Credit Union, 170 F.3d 37, 51 (1st Cir. 1999).

Once a plaintiff has made a prima facie showing, the burden shifts to the defendant to provide a legitimate and non-retaliatory reason for its conduct. See, e.g., Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 172 (1st Cir. 1995). If the defendant does so, then the burden shifts back to the plaintiff to show that the proffered legitimate, non-retaliatory reason was merely a pretext and that the defendant's actions really were the result of retaliatory animus. See, e.g., id. In cases of employment discrimination, the burden on the plaintiff to bypass summary judgment is "not onerous". See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

In its motion for reconsideration, Defendant assails the six remaining factual bases of Plaintiff's claims.

A. Overtime

In his Complaint and in one of his three administrative charges, Plaintiff accused Defendant of interfering with his overtime compensation. Specifically, Plaintiff claims that Defendant withheld a number of Plaintiff's overtime payments and that the company often did not post overtime opportunities on Plaintiff's computer. According to Plaintiff,

this conduct occurred after he filed his first administrative complaint on August 26, 1997 and continued during much of 1998. Plaintiff supported these accusations with his own affidavit and with the affidavit of another technician, Dana Shaw, who stated that several times he received overtime opportunities on his computer which did not appear on Plaintiff's computer. Defendant did not dispute the merits of this issue in its reply brief. Based on the temporal proximity and the fact that Defendant treated Plaintiff differently from other employees, the Court found that his overtime problems amounted to an adverse employment action causally linked to the protected acts.

Now, Defendant proffers affidavits indicating that it did not withhold overtime opportunities from Plaintiff, and therefore there was no adverse employment action. Defendant points to a company chart showing that Plaintiff worked 497.25 hours of overtime in 1997, which was the second highest total among the technicians at the Ellsworth garage. (See Michael Dunphy Aff., Ex. 1 (Docket #37).) This chart, however, indicates that Plaintiff worked far less overtime hours during and after the month of August as compared to the amount of overtime that he worked during months earlier in the year. Based on the chart, proffered by Defendant, Plaintiff worked an average of approximately 55 overtime hours per month during January through August 1997, but an average of approximately 14.4 overtime hours per month from September through December 1997. The Court notes that the same generally holds true for Plaintiff's co-workers; the chart indicates that the earlier two-thirds of the year were much busier than the latter third for the entire Ellsworth garage in terms of overtime hours worked. Nonetheless, the chart reveals that Plaintiff worked fewer overtime hours than many of his fellow technicians during the final four months of 1997. Therefore, this chart does

little to bolster Defendant's contention that it was not withholding overtime opportunities from Plaintiff in retaliation for filing the MHRC charge.

In the alternative, Defendant argues that it reduced Plaintiff's overtime opportunities as part of an overall effort to reduce the company's expenditures on overtime throughout Maine in 1997. The company contends that it made an effort to limit overtime opportunities for all of its technicians in the area, which is a legitimate, non-discriminatory reason for the adverse action. Even if this is true, Plaintiff has offered prima facie evidence that he was singled out to receive fewer chances to work overtime as compared to similarly situated employees.

Finally, Defendant argues that the Court should not accept the affidavits submitted by Plaintiff or Dana Shaw because they are not based on personal knowledge and they are not credible. The Court disagrees. Plaintiff stated that he worked overtime hours, received a paycheck, looked at it, then realized that it failed to adequately compensate him for all of the overtime hours that he had worked. Shaw stated that he looked at his computer, saw postings inviting him to work overtime, looked at Plaintiff's computer, and noted that those same postings were not there. Both of these are examples of testimony based on personal knowledge.³ Whether Plaintiff's or Shaw's testimony in this regard is credible is a matter for to the jury. Thus, the Court finds that the matter of overtime continues to present a genuine issue of material fact.

³ Admittedly, Shaw may not be competent to testify that several of Plaintiff's paychecks were missing overtime payments. Then again, it may be the case that Shaw worked certain overtime shifts alongside Plaintiff, and subsequently received overtime compensation while Plaintiff did not. The record is not clear on this issue, but in any event, the Court can ignore this allegation by Shaw in making the determination that the overtime matter is a viable issue for trial.

B. Retraining

In his response to summary judgment, Plaintiff accused Defendant of sending him for “basic retraining,” which he found to be a time-consuming insult that reduced his productivity and his overtime opportunities. Defendant sent Plaintiff to undergo basic retraining two months after he filed one of his MHRC charges. Plaintiff offered an affidavit by a fellow technician who works with Plaintiff at the Ellsworth garage, Steve Andrews, who stated: “In my twenty-five years as [a technician] at Bell Atlantic, I have never seen or heard of any highly skilled [technician], other than David Bishop, being sent for basic retraining.” (Steve Andrews Aff. ¶ 5 (Docket #30).) In its reply brief, Defendant did not debate the issue of basic retraining.

Because the basic retraining reduced Plaintiff’s productivity and interfered with his opportunities to work overtime, the Court found that it was an adverse employment action. Because Defendant allegedly singled out Plaintiff for such basic retraining and because the action was in close temporal proximity to the protected act, the Court found a causal nexus between the adverse action and the protected activity. Therefore, the Court ruled in the partial summary judgment Order that the “retraining” matter amounted to a material issue of fact.

Now, Defendant asserts that being sent for retraining cannot constitute an adverse employment action and that Defendant did not single out Plaintiff. Defendant offers evidence showing that technicians, including Andrews and Plaintiff himself, have gone through retraining courses, such as “Bonding Grounding and Protection”, “1.5 Circuits Turn-Up & Trouble Shooting” and “Fiber Optic Multiplexers.” It is not clear from the record, however, whether these courses fall into the category of continuing technical

education, advanced training, simple training, or *retraining*, which connotes being taught something already known. It could be that these three classes educated technicians in topics with which they were unfamiliar, rendering them training as opposed to retraining. Furthermore, even though Defendant labels these courses as retraining, Plaintiff specifically has taken umbrage with being sent for *basic* retraining.⁴ Viewing the record in a light most favorable to Plaintiff, the Court must accept that the basic retraining of which Plaintiff complains differs from the courses described by Defendant. Therefore, the retraining issue still presents a genuine dispute of material fact.

C. Failure to Provide Rain Gear

Plaintiff alleges that Defendant distributed rain gear to other technicians, but not to him. This conduct began during the same month that Plaintiff filed one of his administrative complaints. Defendant did not address this issue in its reply brief. Because Defendant allegedly treated him differently from his co-workers soon after he filed an MHRC charge, the Court found that this constituted an adverse employment action causally connected to the protected activity.

Now, Defendant alleges that it did not single out Plaintiff because no one in his crew received rain gear. Rather, Defendant argues that another supervisor, not Plaintiff's, violated company policy by providing rain gear to the technicians working under him. Plaintiff, however, testified in his affidavit that every technician at the Ellsworth garage

⁴ In the prior Order, the Court did not highlight the nature of the retraining as "basic" retraining. Plaintiff, however, specifically objected to Defendant sending him for basic retraining. If Defendant had argued this matter in its initial reply brief, the Court probably would have made a distinction between basic retraining and non-basic retraining.

received rain gear except for him. (See David Bishop Aff. ¶ 58.) Therefore, this is simply a factual dispute best left for trial.

D. Withholding Proper Credit for Jobs Completed

Plaintiff alleges that Bell Atlantic credited him for completing two jobs on October 18, 1998, when in reality he performed three that day. According to Plaintiff, who claims to have checked the records himself, all of the other technicians received the correct amount of credit for that day's work. Originally, Defendant did not counter this claim by Plaintiff. Because not receiving proper credit can harm an employee's productivity status and because Defendant allegedly singled out Plaintiff, the Court found this to be an adverse action causally connected to the protected activity.

Now, Defendant alleges that Plaintiff did not receive proper credit on October 18th because of his own error. Specifically, Defendant contends that Bishop failed to "close out" his last job on the company's computer system that day until after the computers had stopped recording times. Therefore, Defendant intimates that it had a legitimate, non-retaliatory reason for recording two completed jobs rather than three. This allegation is based on an affidavit filed by James Jordan, one of Plaintiff's supervisors, who states that he researched the records himself.⁵ Therefore, the Court has been presented with two affidavits, one by Jordan and one by Bishop, each stating that the affiant has researched

⁵ Also, Defendant implies that Plaintiff closed out his last job from the Ellsworth garage, rather than the job site as required by company guidelines. Defendant argues that by violating these guidelines, Plaintiff is wholly responsible for the inaccurate credit report. Jordan, however, does not actually testify that Bishop closed out from the garage rather than the work site; he only implies it. (See James Jordan Aff. ¶ 7.) Drawing all reasonable inferences in Plaintiff's favor, the Court must accept that Plaintiff abided by company policies on October 18th. Moreover, even if Jordan stated, rather than implied, that Bishop closed out his third job from the wrong location, it is not clear to the Court that such an infringement of the rules necessarily affects how employees receive credit for jobs completed.

the records, which show that the other party is mistaken.⁶ Again, the Court views this as a classic example of a factual controversy, best suited for trial.

E. The Action Plan

Plaintiff alleges that Defendant placed him on an action plan, which reduced his productivity and his chances to work overtime. Defendant never placed him on an action plan before he had filed administrative complaints, so it constituted a change in how the company treated him. Therefore, the Court found that this was an adverse action causally connected to the protected activity.

Defendant responded by arguing that the action plan was implemented because of Bishop's low productivity ratings, so the company had a legitimate, non-retaliatory reason for establishing the action plan. Anticipating this argument, Plaintiff stated in his response brief that low productivity was merely a pretext for unlawful retaliation because his evaluation reports consistently revealed low productivity ratings over several years. Plaintiff argued that he had received low productivity ratings for years, so Defendant's implementation of the action plan subsequent to his filing of MHRC charges was probably retaliatory.⁷ The Court held that Plaintiff had formulated a sound prima facie case that the low productivity rationale was merely a pretext.

⁶ Plaintiff supplements his argument with photocopies of some of these disputed records. (See David Bishop Aff., Exs. H & I.) Defendant, however, relies on Jordan's statement alone.

⁷ In its motion for reconsideration, Defendant expends a page reproving a footnote from the prior Order in which the Court stated:

Furthermore, Defendant's reply brief suggests that low productivity was not actually a reason for instituting the action plan. (Def. Mem. in Reply to Pl. Mem. in Opp'n to Summ. J. at 7, Docket #33.) ("The Company has never attempted to use Bishop's poor performance as an excuse for the alleged adverse action for the simple reason that the undisputed facts do not support such an argument.")

Now, Defendant argues that poor productivity was not a pretext for the action plan. Defendant argues that it placed other technicians on action plans too, so Defendant did not treat Plaintiff differently from similarly situated co-workers. The Court, however, found a causal connection between the action plan and the protected conduct not because of disparate treatment, rather, because the action plan represented a change in how the company treated Plaintiff. Therefore, Defendant's new argument does not affect the previous ruling. The action plan continues to be a valid issue for trial.

F. The Three-Day Suspension

Plaintiff alleges that Defendant wrongfully suspended him for three days for removing a defective wire. He argues that he had cut out defective wires many times before, but that Defendant never had disciplined him for such conduct until after he filed charges with the MHRC. Because this was a change in how the company treated Plaintiff, the Court found the suspension to be an adverse employment action causally connected to the protected activity. Defendant argued in its motion for summary judgment that it had a legitimate, non-retaliatory reason for suspending Plaintiff because he destroyed company property when he removed the wire. Viewing the record in a light most favorable to Plaintiff, the Court must accept Plaintiff's version of the facts: that he was justified in removing the disputed wire because it was defective. Therefore, Plaintiff has made a prima facie showing that the removal of the wire was only a pretext for the suspension.

(Order at 31 n.13.) Defendant now argues that it considered low productivity a reason for implementing the action plan, but that low productivity was not the reason behind other types of alleged discriminatory behavior. The distinction is irrelevant, because Plaintiff has offered prima facie evidence demonstrating that low productivity was only a pretext for instigating the action plan.

Now, Defendant repeats the same argument that it made in its original motion for summary judgment. Defendant contends that there cannot be a causal nexus between the suspension and any protected activities because they are too distant in time. First, the Court stated in the prior Order that it found a causal nexus not based on temporal proximity, but on a change in how the company treated the employee. See Simas, 170 F.3d at 51 (holding that a change in how the company treats an employee after he engages in a protected activity can demonstrate the requisite causal nexus). Second, it is not clear that there is a lack of temporal proximity in this situation.

Plaintiff filed his third and final MHRC charge on February 3, 1999, and the suspension occurred on February 28, 2000. Even though more than a year passed between these two events, much occurred in that time span. Plaintiff filed suit in court in May 1999. By February 2000, the parties were enmeshed in discovery. Furthermore, Plaintiff specifically accuses his employer of *continuing* retaliation. Therefore, the Court cannot determine definitively that the three-day suspension was so divorced in time from the protected activity to negate a causal connection. The Court, however, does not have to rely on the timing of events to find a causal link. Rather, the Court can look at other types of circumstantial evidence, such as comments, disparate treatment, statistical evidence or – as utilized here – a change in treatment. See id.; Mesnick, 950 F.2d at 828. Therefore, the Court sees no reason to alter its previous holding. The matter of the three-day suspension presents a viable issue for trial.

V. CONCLUSION

For the foregoing reasons, the Court finds that the six factual bases upon which Plaintiff relies still present genuine issues of material fact. Therefore, Defendant's motion for reconsideration is DENIED.

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this 11th day of January, 2001.

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